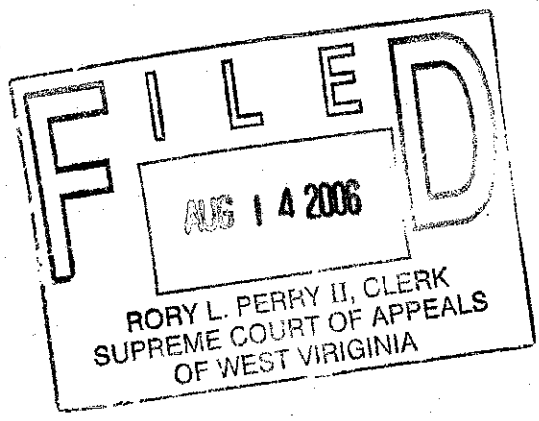
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 33906



JAMES W. KESSEL, M.D.,
RICHARD M. VAGLIENTI, M.D., and
STANFORD J. HUBER, M.D.,

Appellants/Plaintiffs Below,

v.

MONONGALIA COUNTY GENERAL HOSPITAL COMPANY d/b/a MONONGALIA GENERAL HOSPITAL, a West Virginia Non-Profit Corporation, MARK BENNETT, M.D., individually, BENNETT ANESTHESIA CONSULTANTS, P.L.L.C. and PROFESSIONAL ANESTHESIA SERVICES, INC.,

Appellees/Defendants Below.

BRIEF OF *AMICUS CURIAE* WEST VIRGINIA CHAMBER OF COMMERCE

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I. INTRODUCTION AND STATEMENT OF INTEREST

The West Virginia Chamber of Commerce (the "Chamber") submits this brief in support of the Brief of Appellee Monongalia County General Hospital Company ("Monongalia General"). The Chamber has a strong interest in the issue of whether this Court continues to adhere to the statutory mandate and caselaw that require judicial construction of the West Virginia Antitrust Act, 47-18-1, et seq., in accordance with federal antitrust law. The circuit court's grant of partial summary judgment to Monongalia General on Plaintiffs' antitrust claims was based upon a proper construction of West Virginia Code Section 47-18-3(b), consistent with the plethora of federal (and state) antitrust cases that have denied comparable claims under similar circumstances.

With a 5,000 member reach, the Chamber is the recognized voice of business in West Virginia. In that role, it strives to encourage public policies that foster the relocation of new businesses to and the expansion of existing businesses within the state, so that all West Virginians can enjoy the benefits of a robust economy. In furtherance of this goal, the Chamber has been a consistent advocate of a legal system that is predictable in its outcomes and functions within the mainstream of established jurisprudence, so as to ensure that business in West Virginia and the employees of those businesses benefit from the operation of the same general ground rules as their competitors elsewhere in this country.

In this action, the approach of Appellants is harmful not merely because the variance from other states' practices creates a relative disadvantage for West Virginia. Appellants' approach compounds this disadvantage because there is no other body of law, and no alternative standard of any kind, cited to by Appellants as the source of their claims to re-interpret West Virginia's antitrust statute. There is, therefore, no means for citizens to obtain guidance on complying with

this state's law if federal law is disregarded. Judicial construction of Section 47-18-3(b) in accordance with federal antitrust law promotes a predictable and mainstream jurisprudence that is good for the parties, good for businesses and good for the economy of West Virginia.

II. DISCUSSION

A. The History of the West Virginia Antitrust Act

In order to fully understand why the circuit court's grant of partial summary judgment on Plaintiffs' antitrust claims was based upon a proper construction of West Virginia Code Section 47-18-3(b), it is helpful to begin with a history of the West Virginia Antitrust Act. The relevant history predates the enactment of the West Virginia Antitrust Act in 1978 by more than a decade. The process started with an attempt to create a Uniform State Antitrust Act with the purpose of establishing a national antitrust policy. As discussed below, the pertinent sections of the West Virginia Antitrust Act were substantially taken from the first tentative draft of the Uniform State Antitrust Act. The West Virginia statute was, therefore, part of an effort to achieve uniformity, and not an effort to repudiate established antitrust concepts.

1. The First Tentative Draft Uniform State Antitrust Act

In 1963, the Legislative Research Center of the University of Michigan Law School published what was to become a first tentative draft of the present Uniform State Antitrust Act. The draft was heralded as "an important first step toward the creation of a national antitrust policy." Alan Arnold & Tom Ford, Uniform State Antitrust Act: Toward Creation of a National Antitrust Policy, 15 W. Res. L. Rev. 102, 110 (1963-64) [hereinafter "Arnold & Ford"]. The proposed act, appearing after seventy-three years of judicial construction of the Sherman Antitrust Act, 15 U.S.C. § 1, et seq., built on the foundation laid by seven decades of judicial experience:

"[B]asically, the proposed Uniform State Antitrust Act follow[ed] the federal antitrust laws[.]" 5 Trade Reg. Rep. ¶ 50199, at 55521 (Aug. 28, 1963).[1]

Among the draft's provision were section 2 and section 4, which contained substantive prohibitions. Section 2 of the draft contained a general restraint of trade prohibition similar to the first subsection of W. Va. Code § 47-18-3, essentially adopting the language of section 1 of the Sherman Act 15 U.S.C. § 1. Section 4 of the draft read, in relevant part, as follows:

> Without limiting section 2 of this Act, the following unreasonably restrain trade or commerce and are unlawful: (a) a contract, combination, or conspiracy between two or more persons in competition; (1) for the purpose or with the effect of fixing, controlling, or maintaining the market price, rate, or fee of any commodity or service; (2) fixing, controlling, maintaining, limiting, or discontinuing the production, manufacture, mining, sale, or supply of any commodity, or the sale or supply of any service, for the purpose or with the effect of fixing, controlling, or maintaining the market price, rate, or fee of the commodity or service; or (3) allocating or dividing customers or markets, functional or geographical, for any commodity or service[.]

(Emphasis added.)

These provisions, as will be discussed in more detail below, are closely tracked by the West Virginia Antitrust Act. Messrs. Arnold and Ford observed that the draft set forth the prohibited activities in terms parallel to federal antitrust law as it then appeared to stand in the light of the United States Supreme Court's construction of the pertinent federal statutes. See Arnold & Ford, supra. at 103. The draft incorporated terms of art, such as "price fixing" and

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[1]The first tentative draft is currently unavailable in published form. Portions of the draft are discussed and quoted in Arnold & Ford, supra. The first twenty-two sections and accompanying comments of the Legislative Research Center Draftsmen were reprinted in CCH Trade Regulation Reports, 5 Trade Reg. Rep. ¶ 50199, at 55222-31 (Aug. 28, 1963).

"market allocation," that had grown up in federal law.[2] In addition, the prefatory notes to the draft refer to the objective of "cooperative federalism." Prefatory Note, p. 2 (Unpublished initial draft of the Uniform State Antitrust Act, Legislative Research Comm., Univ. of Mich. School of Law 1963). Arnold and Ford explained the significance of cooperative federalism as follows:

> Cooperative federalism can be achieved effectively only if the states have uniform antitrust acts parallel to the federal antitrust laws. If state antitrust laws were uniform, compliance with the state acts usually would be assured by compliance with the federal laws. More importantly, uniform legislation on the state level will provide a remedy for "local" restraints which will have an impact similar to that of the federal antitrust laws, provided that the state laws are enforced adequately in each state.

Arnold & Ford, supra. at 108.

2. The West Virginia Antitrust Act

The West Virginia Legislature enacted the West Virginia Antitrust Act, W. Va. Code § 47-18-1, et seq., in 1978. Although there is a dearth of legislative history associated with its passage, clearly the substantive restrictions of the West Virginia Antitrust Act were modeled largely after the first tentative draft of the Uniform State Antitrust Act. Section 47-18-3(b) provides in relevant part as follows:

> (b) Without limiting the effect of subsection (a) of this section,[3] the following shall be deemed to restrain trade or commerce unreasonably and are unlawful:
>
> (1) A contract, combination or conspiracy between two or more persons:

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[2]See, e.g., United Mine Workers v. Pennington, 381 U.S. 676, 706-707 (1965) (discussing prior cases on market allocation, in the context of the labor exemption); United States v. Oregon Medical Society, 343 U.S. 326, 227 (1952) (finding that prepaid medical plans were not market allocation); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 220-224 (1940)(discussing reasons justifications are not accepted in price fixing cases, and confirming per se illegality); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899) (affirming early decision condemning market allocation).

[3]Like Section 2 of the draft, discussed supra at note 2, Section 47-18-3(a) contains a general restraint of trade provision similar to Section 1 of the Sherman Act.

> (A) For the purpose or with the effect of fixing, controlling, or maintaining the market price, rate or fee of any commodity or service; or
>
> . . .
>
> (C) Allocating or dividing customers or markets, functional or geographic, for any commodity or service.

This language closely tracks the provisions in Section 4(a)(1) and (3) of the draft. West Virginia's statute, therefore, arose out of an effort to achieve uniformity and cooperative federalism. This goal is reflected in West Virginia Code Section 47-18-16, which further provides:

> This article shall be construed liberally and in harmony with ruling judicial interpretations of comparable federal antitrust statutes.

Consistent with the commentators on the first tentative draft of the Uniform State Antitrust Act, James F. Rill observed in a lecture at the West Virginia University College of Law Conference on the West Virginia Antitrust Act of 1978 that "there appears to be an attempt not merely to track the substantive provisions of the Sherman Act but also to clarify its specific applications." James F. Rill, The New West Virginia Antitrust Act from the Defense Perspective, 81 W. Va. L. Rev. 207, 207-08 (1978-79) [hereinafter "Rill"]. Rill explained as follows:

> As to the substantive provisions of the new Act, an attempt is made to identify practices which by definition "shall be deemed to restrain trade or commerce unreasonably and are unlawful." The intent seems to be to isolate and condemn practices traditionally unlawful per se under the Sherman Act: price-fixing, supply control, market division, and boycott conspiracies.

Id. at 208. The proper background for understanding the West Virginia Antitrust Act, therefore, is widely different from that suggested by Appellants. The adoption did not occur as part of an effort to distinguish the West Virginia statute from the basic rules of antitrust jurisprudence nor did it represent a selection of one competing school of antitrust thought over another.

B. The Attorney General's Regulation

The claims of Appellants regarding the Attorney General's regulation, W. Va. C.S.R. § 142-15-1, are wrong as a legal matter because they violate well-established statutory construction principles. Moreover, in departing from those principles, Appellants provide no policy reasons to support their views, and their position actively violates fundamental policy considerations this Court has long endorsed.

The first fundamental principle Appellants disregard is the plain meaning rule, which expressly limits the regulation to actions brought by the Attorney General in federal court. The second fundamental principle Appellants disregard is that terms of art, such as "tying," are to be given the specialized meaning that has grown up during their development. Disregard of both principles is harmful to the stable development of law and the ability of the state's citizens to predict the law and conform their actions to it.

By its plain language, the scope of the regulation relied on by Appellants is limited as follows:

> This rule shall apply to any action brought by the Attorney General as parens patriae in federal court for violations of the federal antitrust laws under W. Va. Code § 47-18-17 and to any person who engages in trade or commerce in or affecting this State.

W. Va. C.S.R. § 142-15-1.1.[4] The limitation of the regulation to federal actions in which the Attorney General participates was emphasized in the stated purpose of the regulation: "to define the term 'federal antitrust laws' as used within W. Va. Code § 47-18-17." W. Va. C.S.R. § 142-15-1.5 (emphasis added). See also W. Va. C.S.R. § 142-15-2 (defining "federal antitrust laws"

[4]The restriction to persons affecting trade or commerce within the state is obviously a jurisdictional limitation.

as used within Section 47-18-17). West Virginia Code Section 47-18-17 is not the basis on which Appellants are suing; that statute authorizes the Attorney General to bring actions on behalf of state residents in federal court. The regulation on its face is limited to a different class of cases.

Where a regulation is clear, it is to be applied, not construed. See Snider v. Fox, 218 W. Va. 663, 627 S.E.2d 353, 357 (2006) (holding that administrative regulations are governed by the canons of statutory construction and that clear and unambiguous rules are to be applied, not construed). This Court has repeatedly emphasized the importance of the "plain meaning" rule. See, e.g., State v. Green, 207 W. Va. 530, 534 S.E.2d 395, 403 (2000); Mildred L.M. v. John O.F., 192 W. Va. 345, 452 S.E.2d 436, 441 (1994); Crockett v. Andrews, 153 W. Va. 714, 172 S.E.2d 384, 386 (1970); Norfolk & W. Ry. Co. v. Mingo County Court, 123 W. Va. 461, 15 S.E.2d 574 (1941). Appellants simply give no basis for disregarding this fundamental rule.

Equally fundamental is the notion that a "term of art" is to be given the meaning that has developed around it, when it is adopted into a legislative enactment. See Stephen L.H. v. Sherry L.H., 195 W. Va. 384, 465 S.E.2d 841, 848-51 (1995). In adopting "'terms of art in which are accumulated the legal tradition in meaning of centuries of practice, [the Legislature] presumably knows and adopts the cluster of ideas that are attached to each borrowed word.'" Id., 465 S.E.2d at 851. (quoting Evans v. United States 504 U.S. 255, 259 (1992)).

In this case, it is undisputed that Monongalia General does not sell anesthesia services, but Appellants countered that its exclusive contracts must nevertheless be considered "tying." Tying itself is judged under the rule of reason, and absent proof of misused market power, is legal. Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551 (1984). Appellants' disregard of that rule is not as fundamental as their disregard of the meaning of the term of art:

"tying." Monongalia General does not sell two products or services, a fundamental aspect of "tying," as it has been long understood. In labeling the exclusive contracts "tying," Appellants redefine the term, without support or explanation. The new definition would make a variety of common commercial practices suddenly subject to a "tying" prohibition, including, for example, the following:

- the bundled sale of goods or services, such as tooth brush and tooth paste, razors and shaving cream, cellular phones and cellular telephone service, or even new automobiles and tires (in theory, a buyer might want no tires or to be able to select specific tires);[5]

- limitations by a garage or automotive repair shop as to brand of replacement parts the garage or shop will use in repairs (often a single provider) or choices for replacement oil, oil filters, or replacement parts (in theory "tying" the goods to the separate service market);

- agreements between banks and appraisal firms, establishing the firm as the exclusive service for appraising commercial property values for loan purposes (in theory tying the loan to a purchase, by the commercial borrower, of a particular appraisal service) ;

- exclusive service arrangements, such as the limitation by a merchant to as to warranty repairs, selecting a single authorized repair agent, or a designated group (in theory, "tying" the sale of the goods to particular services provider);

- exclusive representation arrangements in which property developers may sell homes or commercial developments exclusively through a single real estate agency (in theory tying the sale of homes to particular real estate agencies)

All of the foregoing could be characterized as "tying" if one were to disregard the meaning established in antitrust jurisprudence, and it is that established jurisprudence that is the proper source for understanding the West Virginia Antitrust Act.

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[5]Under federal law, of course, it is established that such bundled sales are not tying, as long as the tied product is available separately at a reasonable price. Appellants, of course, urge disregard of federal law.

C. Experience with Other State Antitrust Statutes

There is, in fact, no body of law under other states' antitrust statutes treating practices such as those at issue here as illegal per se, as Appellants seek to do. There is no developed body of law that would delineate a per se rule that would include the contracts Appellants challenge, and certainly no body of case law that would invalidate the contracts before the Court and not also encompass the practices listed above. Thus, acceptance of the views of Appellants would alter this State's law to create disadvantages for West Virginia business not faced in other states, and would do so without even providing any reasonable guidance for future conduct by citizens of this State.

The basic approach of the initial draft Uniform State Antitrust Act to the problem of defining substantive offenses has found support in other states besides West Virginia. For example, even before the West Virginia Antitrust Act was enacted, Connecticut,[6] Illinois,[7] Maryland[8] and Minnesota[9] enacted antitrust acts reflecting to varying degrees the influence of the initial draft's concepts as to what constitutes a substantive offense. Courts construing the antitrust acts of three of these states, Connecticut, Illinois and Maryland, have dismissed state antitrust claims against hospitals and others based upon conduct similar to the allegations against Monongalia General in this action.

First, in Douglas v. Hospital of St. Raphael, 33 Conn. Supp. 216, 371 A.2d 396 (1976), a physician sued a hospital and an association of anesthesiologists for alleged price fixing of

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[6]See Conn. Gen. Stat. § 35-24, et seq.

[7]See 740 Ill. Comp. St. 10/1, et seq., formerly, Ill. Rev. St. Ch. 38, ¶ 60-1, et seq.

[8]See Md. Code § 11-201, et seq., formerly Md. Code Art. 83 § 37, et seq.

[9]See Minn. Stat. § 325D.49, et seq.

anesthesiology services, in violation of the Connecticut Antitrust Act. The plaintiff alleged that an exclusive contract between an unrelated anesthesiology group and the defendant hospital included a price fixing agreement.[10] Id., 371 A.2d at 396-97. In that case, the court observed that it was self-evident that the Connecticut Antitrust Act provisions at issue were based on the federal antitrust enactments. Accordingly, although Connecticut then had no provision similar to West Virginia Code Section 47-18-16 (mandating construction in accordance with Federal law), the court held that the Connecticut Antitrust Act should be construed in the context of the applicable federal decisions. Id., 371 A.2d at 398.[11] Construing the Connecticut Act in accordance with federal law, the court dismissed the price fixing claim because the plaintiffs did not purchase anesthesia services and thus lacked standing. Id., 371 A.2d at 399 ("it is clear that the plaintiff, as a litigant trying to redress a public wrong without establishing a private injury, has no standing to do so under antitrust law").[12]

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[10]Section 35-28 of the Connecticut Antitrust Act provides in relevant part: "Without limiting section 35-26, every contract, combination, or conspiracy is unlawful when the same are for the purpose, or have the effect, of: (a) Fixing, controlling, or maintaining prices, rates, quotations, or fees in any part of trade or commerce[.]"

[11]In 1992, after Douglas, the Connecticut Legislature enacted Connecticut General Statute Section 35-44b, which provides for construction in accordance with interpretations given by the federal courts to federal antitrust statutes.

[12]Douglas relied in part on Connecticut Association of Clinical Laboratories. v. Connecticut Blue Cross, Inc., 31 Conn. Supp. 110, 324 A.2d 288 (1973), wherein the court explained:

> The plaintiffs in argument . . . limited their claim to one of secondary boycott and claimed a per se violation. Section 5 (General Statutes [Section] 35-28(d)) of the Act has no specific counterpart in the federal antitrust laws. It is a codification of what have come to be known as "per se" violations of the Sherman Act, notably [Section] 1. . . . Section 5 concerns itself with concerted activity in the areas of: (a) price fixing, (b) controlling production, (c) territorial allocation, and (d) group boycotts.

Id., 324 A.2d at 291-92.

Construing Section 5 of the Connecticut Antitrust Act in accordance with federal law, the court held:

> We conclude that resort to the per se rule is justified only when the presence of exclusionary or coercive conduct warrants the view that the arrangement in question is a "naked restraint of trade." Absent these factors, the rule of reason must be followed in determining the legality of the arrangement.

Second, in Collins v. Associated Pathologists, Ltd., 844 F.2d 473 (7th Cir. 1988), a pathologist brought an antitrust action, alleging that he was prevented from practicing pathology at the hospital where he had worked for eight years because his membership in a corporation with an exclusive agreement with the hospital to provide services had been terminated. The plaintiff asserted several claims under federal antitrust law and the Illinois Antitrust Act, Il. St. Ch. 38 ¶ 60-3(2), (3) and (4).[13] The district court granted summary judgment to the defendants, and the Seventh Circuit affirmed. Construing the Illinois Antitrust Act consistently with federal law, the court held that the plaintiff's tying claim was subject to a rule of reason analysis under Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551 (1984), rather than the per se analysis as argued by the plaintiff. Collins, 844 F.2d at 480-81.

Third, in Imaging Center, Inc. v. Western Maryland Health Systems, Inc., 158 Fed. Appx. 413, 2005-2 Trade Cases ¶ 75,056 (4th Cir. 2005) (per curiam), a physician and his radiology center brought an action against a hospital and its radiology facility under federal antitrust law and the Maryland Antitrust Act, alleging that exclusive contracts between the hospital and one radiology facility constituted exclusive dealing and that referral monitoring constituted a group boycott. The district court granted the defendants' motion for summary judgment on federal and state claims, and the Fourth Circuit affirmed. The Fourth Circuit agreed with the district court's analysis insofar as it held that the Maryland Antitrust Act claims must fail for the same reasons that the analogous federal claims failed. Id. at 422.

Id., 324 A.2d at 293.

[13]Section 60-3 is now cited as Illinois Statutes Chapter 740 S 10/3. It contains substantive prohibitions similar to Section 47-18-3(b), although those prohibitions were not at issue in Collins.

The holdings in these cases are consistent with the numerous other courts that have dismissed state antitrust claims against hospitals and others based upon conduct similar to the allegations against Monongalia General in this action. See, e.g. Belmar v. Cipolla, 96 N.J. 199, 475 A.2d 533 (1984) (upholding dismissal of plaintiff anesthesiologist's state antitrust tying claim, challenging hospital's exclusive contract with group of anesthesiologists for provision of all anesthesiology services at hospital); Griffin v. Guadalupe Med. Ctr., Inc., 123 N.M. 60, 933 P.2d 859 (N.M. App. 1997) (affirming judgment for defendants on state antitrust tying claim brought by nurse anesthesiologists, challenging exclusive services contract); Gonzalez v. San Jacinto Methodist Hosp., 880 S.W.2d 436 (Tex. App. 1994) (upholding summary judgment for defendants on state antitrust tying claim brought by anesthesiologist, challenging exclusive contract); Dattilo v. Tucson Gen. Hosp., 23 Ariz. App. 392, 533 P.2d 700 (1975) (holding that exclusive contract did not violate state antitrust statute).

There is, therefore, no body of state antitrust law applying tying, price fixing or market allocation as Appellants now ask the Court to use those terms,.

D. The Radical Departure from Established Usage Sought by Appellants is Unjustified and Unwise.

This Court has previously rejected a literal approach to the terms of art found in the West Virginia Antitrust Act. In Reddy v. Community Health Foundation, 171 W. Va. 368, 372, 298 S.E.2d 906 (1982), this Court rejected the claim that restrictive covenants, precluding an employee or contracting party from competing with another, violated the West Virginia Antitrust Act. Such covenants directly restrain the practice of a trade or profession, or restrict competition in some line of business. Although setting forth a test by which such covenants might be found invalid under this state's common law, this Court squarely rejected the claim that such direct

restraints violate West Virginia antitrust laws. The Court noted that any simplistic argument about restraints of trade "fails to recognize that the phrase 'in restraint of trade' is a term of art." Id., 298 S.E.2d at 909.

Disregarding the meaning of terms of art leads to absurd, or extremely harmful, interpretations. The adverse consequences of Appellants' view of tying was discussed above, in section A. Even more harmful results flow from applying Appellants' views to "price fixing" or "market allocation." "Price fixing," for example would, in its literal meaning, preclude nearly every commercial contract in which a sales price is agreed upon – a result that could not be intended by our Legislature and that would halt commerce. Other widespread practices close to those at issue, that would be unlawful under the approach of Appellants, include:

- joint bids, by a contractor and multiple sub-contractors, for a construction project (the component prices are "fixed" in the joint bid);
- special financing programs sponsored by car dealerships, with particular banks, for discount rates to be offered to customers of the dealer (the financing price is "fixed" by agreement with the dealer);
- joint purchasing cooperatives, such as non-profit organizations and small business organizations, established to compensate for lack of size of the individual members (jointly "fixing" the price members pay for goods they chose to buy through the cooperative);
- selection of one service provider (for janitorial services, employee health screening or office supplies) to supply a firm's needs in Charleston, and a second provider to meet the firm's needs in its Wheeling facilities ("market allocation" in the view of Appellants);
- exclusively contracting with one vending machine service provider for discount prices to be offered at all vending machines in a large plant (in the view of Appellants, simultaneously allocating a market, fixing prices, and tying the employees' jobs to a single vending machine choice);

Even acts as clearly proper as the agreement of two partners, in a business venture, agreeing on the price at which they sell their products, falls within the literal meaning of "price fixing." The United States Supreme Court has rejected such a simplistic approach. See Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 99 S. Ct. 1551, 1556-57 (1979) (criticizing literal reading of term price fixing as "overly simplistic and often overbroad," and observing that "[w]hen two partners set the price of their goods or services they are literally 'price fixing,' but they are not per se in violation of the Sherman Act").

The insistence of Appellants that this accepted approach be rejected, in favor of a literal approach, disregards established legal rules and sound policy. This Court should continue to adhere to the statutory mandate and caselaw that require judicial construction of the West Virginia Antitrust Act in accordance with federal law and the terms of art adopted from it. In Blewett v. Abbott Laboratories, 86 Wash. App. 782, 938 P.2d 842 (1997), the court explained the policy reasons for this faithfulness to established jurisprudence as follows:

> In directing courts to be "guided by" federal law, the Legislature presumably intended to minimize conflict between the enforcement of state and federal antitrust laws and to avoid subjecting Washington business to divergent regulatory approaches to the same conduct. Any departure from federal law, therefore, must be for a reason rooted in our own statutes or case law and not in the general policy arguments that this court would weigh if the issue came before us as a matter of first impression.

Id., 938 P.2d at 846. In this action, the absence of any policy arguments by Appellants and the absence of any alternative standard or line of cases under which to construe the terms of art in the West Virginia Antitrust Act, makes the acceptance of Appellants' position particularly dangerous and unwise.

The lack of support for Appellants' views is emphasized in cases on which Appellants purport to rely. Appellants, for example, cite to State ex rel. Humphrey v. Alpine Air Products,

Inc., 490 N.W.2d 888 (Minn. Ct. App. 1992), aff'd on other grounds, 500 N.W.2d 788 (Minn. 1993), as support for their position. In Alpine Air Products, the court actually construed the Minnesota Antitrust Act in accordance with federal law. The court explained as follows:

> Minnesota courts have consistently held that Minnesota antitrust law is to be interpreted consistently with the federal courts' construction of federal antitrust law.

Id. at 894. The Minnesota court pointed out the importance of establishing a predicable standard of conduct, and rejected the very approach Appellants now urge, with the following explanation:

> We believe policy considerations suggest following federal precedent for substantive offenses. Without uniform construction between state and federal antitrust laws, businesses will have a difficult time predicting the antitrust implications of their business decisions. Enforcement of state and federal antitrust laws will also be aided by a policy of uniform interpretation. Therefore we conclude Minnesota antitrust law should be interpreted consistently with federal court interpretations of the Sherman Act unless state law is clearly in conflict with federal law.

Id. at 894.

Judicial construction of Section 47-18-3(b) in accordance with federal antitrust law promotes a predictable and mainstream jurisprudence that is good for the parties, good for businesses and good for the economy of West Virginia. This is especially true as there is no other body of law, and no alternative standard of any kind, being proposed by Appellants in this case. Under these circumstances, deviating from the proper construction of the West Virginia Antitrust Act would create much uncertainty, having devastating effects on the entire field of antitrust jurisprudence.

III. CONCLUSION

This Court should continue to adhere to the statutory mandate and caselaw that require judicial construction of the West Virginia Antitrust Act in accordance with federal antitrust law. The circuit court's grant of partial summary judgment to Monongalia General on Plaintiffs'

antitrust claims was based upon a proper construction of Section 47-18-3(b), consistent with the plethora of federal and state antitrust cases that have denied comparable claims under similar circumstances. Moreover, the circuit court's rejection of Appellants' proposed construction of Section 142-15-3 was also warranted.

For all of the foregoing reasons, the Court should affirm the judgment of the circuit court in all respects.

Respectfully submitted on this 14th day of August, 2006.

WEST VIRGINIA CHAMBER OF COMMERCE

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I hereby certify that, on August 14, 2006, I caused the foregoing "Brief of Amicus Curiae West Virginia Chamber of Commerce" to be served upon all counsel of record by placing copies thereof in the United States mail, addressed to the following counsel.

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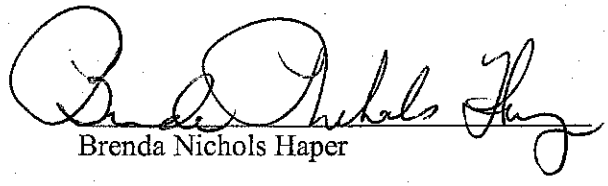

Brenda Nichols Haper